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THIRD CIRCUIT'S NEW ROLE AS ACTIVIST COURT ON IMMIGRATION ISSUES

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I. INTRODUCTION

IN *Cham v. Attorney General*,¹ the Third Circuit Court of Appeals reviewed a political asylum claim that was denied by the Board of Immigration Appeals ("BIA"). Judge Barry's introductory paragraph, borrowed from a 1997 Seventh Circuit decision,² set the tone for the opinion:

It is a hallmark of the American system of justice that anyone who appears as a litigant in an American courtroom is treated with dignity and respect. That expectation must be met regardless of the citizenship of the parties or the nature of the litigation. In a country built on the dreams and accomplishments of an immigrant population, a particularly severe wound is inflicted on that principle when an immigration matter is not conducted in accord with the best of our tradition of courtesy and fairness.³

In recent years, the Third Circuit has published several cases involving difficult, and sometimes controversial, immigration law issues. For academics and immigration law practitioners concerned with constitutional due process and fundamental fairness to alien litigants, the recent

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1. 445 F.3d 683 (3d Cir. 2006).

2. See *Iliev v. INS*, 127 F.3d 638, 643 (7th Cir. 1997) (noting that persons appearing before Immigration Judge are entitled to fundamental fairness).

3. *Cham*, 445 F.3d at 685.

overall track record of the Third Circuit is an extremely refreshing development. Although the court's reviewing powers are substantially limited by statutory review provisions,⁴ and although the Supreme Court has coined the *Chevron*⁵ deference principle pertaining to judicial review of federal administration decisions, the Third Circuit has often taken an aggressive role in reviewing individual cases. Likewise, the court has not hesitated to pronounce its concerns regarding what it has perceived to be systemic defects in the administrative decision making process.

This Article will survey several Third Circuit decisions announced within the past two years. Examining these decisions by category of case, it will discuss some common themes that pervade the court's mentality concerning its role as overseer of the bureaucratic administrative mechanism for determining the fates and attendant rights of aliens ensnared in removal proceedings.

II. THE THIRD CIRCUIT'S CONCERN FOR FAIRNESS AND ACCURACY IN ASYLUM ADJUDICATIONS

Cham involved a petition for review, filed by Abou Cham, a twenty-seven-year-old citizen of The Gambia, who entered the United States with his cousin's passport, and filed for political asylum and related refugee relief.⁶ He was eventually placed into removal proceedings, in which evidentiary hearings were conducted before Philadelphia Immigration Judge ("IJ") Donald Ferlise. Ferlise ruled that Mr. Cham's testimony was totally unbelievable, that no portion of his testimony made sense, and went so far

4. See, e.g., Immigration and Nationality Act § 242, 8 U.S.C. § 1252 (2005) (addressing judicial review of orders of removal).

5. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984) (noting court may not substitute its construction of statutory provision for reasonable interpretation made by agency administrator).

6. See *Cham*, 445 F.3d at 689-90 (presenting facts of case and Judge Ferlise's denial of Cham's asylum application). Applications for asylum are governed by 8 U.S.C. § 1158, which was added to the INA pursuant to the Refugee Act of 1980. See 8 U.S.C. § 1158 (2006) (detailing asylum application process); 8 C.F.R. § 208 (2006) (detailing regulations for procedures for asylum and withholding of removal). A refugee is "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution. . . ." 8 U.S.C. § 1101(a)(42) (defining refugee). Applications for asylum are also deemed to include applications for withholding of removal, also referred to as restriction on removal. See *id.* § 1231(b)(3) (detailing restrictions on removal to country where alien's life would be threatened). With certain statutory exceptions, withholding of removal is a mandatory form of relief, if a clear probability of persecution is established. This is a more exacting standard than required for asylum, which can be granted either based on past persecution or a well-founded fear of future persecution. However, asylum is a discretionary benefit. The mere fact that an applicant satisfies the definition of "refugee" does not entitle the applicant to a grant of asylum. Many applicants for asylum and withholding also request relief under the United States Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). The standards for CAT relief are set forth at 8 C.F.R. §§ 208.16-18 (2006).

as to find that Cham fabricated his entire case in chief, such as to render his application for asylum to be frivolous. Cham filed an administrative appeal with the BIA.⁷ The BIA upheld the IJ's primary decision, but reversed the IJ's finding of frivolity as the record did not support the assertion that Cham's application was knowingly fabricated. The BIA faulted the IJ for failing to provide a sufficient explanation for why he came to that conclusion.

Given the formidable volume of review petitions filed in the federal courts of appeals of late, a phenomenon which has been publicized in the mainstream media and law journals alike,⁸ it would have been easy for the Third Circuit to review the record and issue a boilerplate decision announcing that the administrative decision was supported by substantial evidence of record, fully confident that the BIA had adequately performed its review function.⁹ Despite this, the *Cham* court quoted substantial portions from the Immigration Court hearing transcript, and severely chastised the IJ for his conduct during Cham's hearing. Immediately following the paragraph quoted above, the court continued its opinion with the following language:

The case now before us exemplifies the "severe wound . . . inflicted" when not a modicum of courtesy, of respect, or of any pretense of fairness is extended to a petitioner and the case he so valiantly attempted to present. Yet once again under the "bullying" nature of the immigration judge's questioning, a petitioner was ground to bits.¹⁰

7. See 8 C.F.R. § 1003.1 (2006) (defining jurisdiction and powers of Immigration Judges and single Board of Immigration Appeals, that are part of Executive Office for Immigration Review, sub-agency of Department of Justice).

8. See, e.g., John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005); Brian Donohue, *Immigrants Cite Judicial Discourtesy: Federal Appellate Panels Note 'Disturbing Pattern'*, THE STAR-LEDGER (Newark, N.J.), Nov. 29, 2005 (stating 515% increase in appeals in past four years); Pamela A. MacLean, *Judges Blast Immigration Rulings*, NAT'L L.J., Oct. 24, 2005, at S1 (noting appellate courts are drowning in immigration appeals).

9. Although circuit courts often introduce reviews of asylum applications with the observation that their review powers are circumscribed to determining whether sufficient evidence supports the agency's decision, as opposed to conducting *de novo* review, in the past two years, there have been a surprisingly high rate of grants of petitions for review in asylum cases. In *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001), the court stated that if the BIA's denial of asylum and withholding of deportation is supported by "substantial evidence" we must honor that conclusion. *Id.* at 483-84 (noting substantial evidence is more than mere scintilla). The substantial evidence standard is deferential to the BIA's determination, and we will overturn it only if the evidence in the record compels a conclusion contrary to that reached by the BIA. See *id.* (describing substantial evidence requirement); see also *He Chun Chen v. Ashcroft*, 376 F.3d 215, 222 (3d Cir. 2004) (asserting "we are required to sustain an adverse credibility determination 'unless . . . no reasonable person' would have found the applicant credible").

10. *Cham*, 445 F.3d at 686.

The court then cited prior opinions where Judge Ferlise's conduct was similarly condemned.¹¹

The court observed that "[o]n the day on which oral argument was heard in [the *Cham*] case, a Deputy Attorney General appeared [before the court,] at the court's request, to explain what, if any, procedures are followed when repeated conduct of this nature is seen."¹² The court alluded to another relevant event that also occurred on the date of oral argument.¹³ On January 9, 2006, the Attorney General announced that he would conduct "a comprehensive review of immigration courts."¹⁴ He circulated a memorandum to the Immigration Judges, expressing the following:

I have watched with concern the reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice. While I remain convinced that most immigration judges ably and professionally discharge their difficult duties, I believe there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve.¹⁵

In granting the petition for review and remanding to the BIA for further proceedings, the court urged that on remand a different IJ should be assigned.¹⁶ The court clarified that it was taking no position on whether or not the petitioner should ultimately prevail.¹⁷

On the very same date that the *Cham* decision was announced, the Court of Appeals for the Third Circuit decided another asylum case, *Shah v. Attorney General*,¹⁸ which also originated in Judge Ferlise's court. The

11. See *Fiadjoe v. Attorney Gen.*, 411 F.3d 135, 146, 155 (3d Cir. 2005) (criticizing Judge Ferlise's "bullying" and "brow beating" of young woman asylum applicant and describing his oral decision, later sanitized, as "crude and cruel"). In *Fiadjoe*, the court considered that Judge Ferlise's "continuing hostility towards the obviously distraught [petitioner] and his abusive treatment of her throughout the hearing, reduced her to [an inability to respond]." *Id.* at 145; see also *Sukwanputra v. Gonzales*, 434 F.3d 627, 638 (3d Cir. 2006) (criticizing Judge Ferlise's "intemperate and bias-laden remarks . . . none of which had any basis in the facts introduced, or the arguments made, at the hearing").

12. *Cham*, 445 F.3d at 686.

13. See *id.* (recognizing that Attorney General's announcement was not coincidental).

14. *Id.*

15. *Id.* at 685-86. The Attorney General directed a similar memo, on the same date, to the Board of Immigration Appeals. See 83 No. 3 Interpreter Releases 122 (Jan. 17, 2006) (ordering review of Immigration Courts).

16. See *Cham*, 445 F.3d at 694 (recognizing that assignment of IJ is within province of Attorney General).

17. See *id.* (remanding for further proceedings consistent with opinion).

18. 446 F.3d 429 (3d Cir. 2006).

court introduced its opinion with stark language: "Petitioner's father was killed in cold blood, and the government concedes that he is dead."¹⁹

The petitioner in *Shah* was a citizen of Pakistan, whose persecution claim was based upon her family's involvement in the Muttahida Qaumi Movement ("MQM"), a political group representing the Mohajir (Urdu speaking immigrants from India) population in Pakistan.²⁰ Again, the circuit court was highly critical of IJ's handling of the case. The court commented, "[a]lthough we don't expect an [IJ] to search for ways to sustain an alien's testimony, neither do we expect the judge to . . . undermine and belittle it."²¹ Reversing and remanding the BIA's decision affirming the IJ's denial of asylum, the court of appeals urged that a different IJ be assigned if it is determined that an IJ's services are needed on remand.²²

The Third Circuit has not restricted its stern criticism to Judge Ferlise. In *Wang v. Attorney General*,²³ the court granted review to an applicant from the People's Republic of China whose asylum claim was predicated upon involuntary sterilization of his wife.²⁴ The court devoted a considerable portion of its opinion to critiquing IJ Garcy's conduct during the hearing. The hearing transcript was interspersed with intemperate remarks by the IJ, who demonstrated her personal bias against the applicant. She attacked the applicant's motivation and morality. She accused him of being selfish for not paying a fine imposed upon his parents. She called Mr. Wang a "horrible father," and stated that she was embarrassed to have him in the courtroom.²⁵ The BIA affirmed the IJ's decision in a one-paragraph opinion.

The Third Circuit Court of Appeals held that the IJ's adverse credibility findings could not be upheld because of the "pervasive influence of [her] unduly harsh character judgments."²⁶ The court also referred to previous decisions in which it had already admonished IJ's for their inappropriate conduct and defective inferential reasoning.²⁷ The court expressed its frustration with the magnitude of the problem, noting that "[t]ime and time again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings."²⁸ The court noted that it had to admonish immigration judges "who failed to treat the asylum applicants in their court with the appropri-

19. *Id.* at 430.

20. *See id.* at 431 (presenting facts of case).

21. *Id.* at 437.

22. *See id.* (remanding for further proceedings consistent with this opinion); *see also* Marisa Taylor, *Immigration Judges Under Scrutiny*, MIAMI HERALD, July 5, 2006, at 9A (claiming Judge Ferlise has since been relieved of his duties).

23. 423 F.3d 260 (3d Cir. 2005).

24. *See id.* at 261-62 (detailing facts in case).

25. *See id.* at 265 (recounting oral opinion of Immigration Judge).

26. *Id.* at 270.

27. *See id.* at 267-68 (noting pattern of misconduct by Immigration Judge).

28. *Id.* at 267.

ate respect and consideration” three times in 2005.²⁹ By way of example, the court referred to *Zhang v. Gonzales*,³⁰ in which Circuit Judge McKee “expressed his concerns about an IJ’s apparent ‘search for ways to undermine and belittle’ the alien’s testimony, and the possibility that the IJ’s decision ‘was influenced by his view of Zhang’s parenting.’”³¹ The court also alluded to several similar decisions from other circuits as revealing that “[a] disturbing pattern of IJ misconduct has emerged notwithstanding the fact that some of our sister circuits have repeatedly echoed our concerns.”³²

The rather dramatic decisions in cases such as *Cham*, *Shah* and *Wang* have attracted attention in both the mainstream media and in law journals. One article showcased the *Shah* and *Cham* cases as examples of IJ decisions that circuit courts found troubling.³³ The article noted that Judge Ferlise was removed from the bench in May and cited statistics revealing a seven-fold spike in appeals of immigration cases in the past four years.³⁴ The article referenced the streamlining process that the BIA implemented in 2002 and the Attorney General’s January 9, 2006 Memorandum.³⁵

A 2006 *Harvard Law Review* Note discusses the *Wang* case alongside *Benslimane v. Gonzales*,³⁶ a highly publicized Seventh Circuit decision by Judge Posner.³⁷ The Note claims “U.S. immigration courts are in crisis” and, “[a]s the most visible sign of the emergency, appeals of immigration cases have swollen in the past five years from three percent to eighteen percent of all federal appeals.”³⁸ The Note refers to the Third Circuit’s *Wang* case, in which Judge Fuentes condemned the “disturbing pattern of [immigration judge] misconduct,” and the “extraordinarily abusive” immigration judge, who ordered an “asylum seeker deported to a country where she had been held as a sex slave and faced the possibility of continued slavery and rape.”³⁹ The article also uses the Third Circuit’s

29. See *Wang v. Attorney Gen.*, 423 F.3d 260, 267 (3d Cir. 2005).

30. 405 F.3d 150 (3d Cir. 2005).

31. *Wang*, 423 F.3d at 267.

32. *Id.* at 268.

33. See Taylor, *supra* note 22, at 9A (noting decisions by immigration judges have come under intense scrutiny).

34. See *id.* (noting that 1600 appeals were filed in 2001 compared to 12,800 in 2005).

35. See *id.* (indicating Justice Department has begun to take steps to address problems).

36. 430 F.3d 828 (7th Cir. 2005).

37. See generally Recent Case, *Immigration Law-Administration Adjudication-Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*, 119 HARV. L. REV. 2596 (2006).

38. *Id.* at 2596.

39. *Id.* at 2597 (quoting *Fiadjoe v. Attorney Gen.*, 411 F.3d 135, 154 (3d Cir. 2005)).

*Sukwanputra v. Gonzales*⁴⁰ case as an example of an IJ's derogation of his responsibility of neutrality and impartiality.⁴¹

On July 31, 2006, the mainstream media reported on a study conducted by Transactional Records Access Center at Syracuse University.⁴² This study documented the great disparity in the rate at which individual immigration judges decline asylum applications. The study reported that denial rates for the 208 judges nationwide ranged from a low of 10% to a high of 98%.⁴³ *The New York Times*, summarizing the Report, noted that, from 2000 to 2005, a particular Miami IJ denied 96.7% of the asylum cases before him in which the petitioner had a lawyer, whereas a New York judge denied asylum in just 9.8% of the cases before her. The article observed that the Third Circuit had been repeatedly forced to rebuke immigration judges for "intemperate and humiliating remarks."⁴⁴ The article also refers to Judge Posner's November comment (without specifically citing the *Benslimane* case) for the proposition that the handling of asylum cases by immigration judges had "fallen below the minimum standards of legal justice."⁴⁵

On July 31, 2006, the *Miami Herald* reported on the Syracuse study, noting that its findings directly challenged the mission statement of the Executive Office for Immigration Review ("EOIR"), to the effect that the U.S. government is "committed to providing fair, expeditious and uniform application of the nation's immigration laws in all cases."⁴⁶ The media attention to this phenomenon of dramatically inconsistent and bizarre decision making by the immigration administrative tribunals is mostly attributable to the scathing criticism by the circuit courts in selected decisions. The Third Circuit and the Seventh Circuit have been at the forefront in exposing this serious problem, which adversely reflects on this country's treatment of foreign persons seeking justice in this land.

The sheer volume of cases reaching the courts of appeals in recent years is undoubtedly a direct result of the abdication of quality administrative review by the BIA, following Attorney General John Ashcroft's soundly

40. 434 F.3d 627 (3d Cir. 2006).

41. See Recent Case, *supra* note 37, at 2597-98 (reciting judge's remarks to asylum seeker).

42. See TRAC, Syracuse University, *Judges Show Disparities in Denying Asylum* (July 31, 2006), <http://www.trac.syr.edu/immigration/reports/160/> (analyzing how asylum requests had been handled).

43. See *id.* (detailing denial rates).

44. See Rachel L. Swarns, *Study Finds Disparities in Judges' Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A15 (noting disturbing pattern in cases from around country).

45. See *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (emphasizing concern with effective enforcement of immigration laws).

46. See U.S. Dep't of Justice Executive Office for Immigration Review, <http://www.usdoj.gov/eoir/responsibilities.htm> (last visited Oct. 28, 2006) (stating office's responsibilities).

criticized initiative to streamline the Board's review process.⁴⁷ Since the program was launched, practitioners have been chagrined with the receipt of cursory BIA decisions, suggesting that the single Board member summary orders are issued without any careful review of the record or the briefs submitted by the parties. Immigration Judge Marks—the head of the Immigration Judges' Organization—has publicly lamented the fact that the Board has abandoned its previous role of polishing IJ decisions.⁴⁸ Fortunately, many of the circuit courts have sought to correct bad decisions and to comment on the pervasive problem.

In the celebrated case of *Lusingo v. Gonzales*,⁴⁹ the Third Circuit Court of Appeals even faulted the Department of Justice for its litigation posture.⁵⁰ Petitioner Fikiri Lusingo was a sixteen-year-old who came to the United States on a visitor's visa with a group from his native Tanzania to attend an international Boy Scout Jamboree.⁵¹ He and two other scouts decided to venture away from the regular program, presumably to experience other aspects of U.S. culture.⁵² When they learned, through the media, that concern had been expressed about their disappearance, they reported to a police station in Maryland and were then transferred to the INS.⁵³ Deportation proceedings followed. Lusingo applied for asylum, claiming that he feared retribution by his country for his extracurricular activities in the United States.⁵⁴ Prior to his apprehension, he unknowingly launched a "media frenzy" while people searched for him.⁵⁵ The American media reported stories describing how poorly the Tanzanian government treated street children and detailing the deplorable conditions in Tanzanian prisons.⁵⁶ While Lusingo presented persuasive evi-

47. See 8 C.F.R. § 1003.1(e) (2006) (detailing Case Management System established to screen all cases and manage BIA's caseload). Every circuit to decide the issue has upheld the validity of the regulations. The Third Circuit joined the Fifth, Sixth, Seventh, Ninth and Eleventh Circuits in upholding the regulations against a due process attack. See *Dia v. Ashcroft*, 353 F.3d 228, 238 (3d Cir. 2003) (listing cases by other circuit courts upholding regulations).

48. See Howard Mintz, *Appeals Board Widens Barrier to Immigration* (Sept. 19, 2005), <http://www.alipac.us/ftopic-10416-next.html> (last visited September 29, 2006) (noting preference for strong appeals board reviewing immigration judges' work). Judge Marks commented, "if we make a mistake, we could be sending someone home to die." *Id.* In the same article, U.S Congresswoman Zoe Lofgren, a member of the House Judiciary sub-committee on Immigration and Border Security, was quoted as saying: "Bad mistakes are being made." *Id.*

49. 420 F.3d 193 (3d Cir. 2005).

50. See *id.* at 201 (criticizing arguments Attorney General made in its brief).

51. See *id.* at 195 (detailing background of case).

52. See *id.* (noting that they went to home of relative of one of boys).

53. See *id.* (recounting factual background).

54. See *id.* (noting Lusingo feared persecution).

55. See *id.* at 201 (commenting that media coverage included unflattering information about Tanzanian government).

56. See *id.* (stating facts of case).

dence to substantiate his claims, the IJ denied the application and the BIA affirmed.⁵⁷

The Third Circuit concluded that the BIA's reasoning with respect to the evidence was flawed.⁵⁸ The court rejected the Attorney General's argument that the absence of Tanzanian newspaper articles and editorials on the Lusingo situation undermined the petitioner's claim, noting that the court had previously rejected similar poorly-reasoned arguments.⁵⁹ Furthermore, the court also rejected the government's contention that the Tanzanian Ambassador's assurance that the petitioner had nothing to fear discredited the asylum application.⁶⁰ The court characterized the government's arguments as "myopic."⁶¹

Interestingly, Lusingo did not base his claim upon Tanzania's adverse treatment of so called "street children." Indeed, in *Escobar v. Gonzales*,⁶² the Third Circuit had concluded that street children do not comprise a "social group" within the definition of refugee so as to be accorded eligibility for asylum.⁶³

At the Immigration Judges' training conference in August, 2006, the Attorney General ordered the Department of Justice to implement twenty-two "new measures to enhance the performance of Immigration Courts" and the BIA.⁶⁴ These measures include: conducting IJ performance evaluations; standardizing complaint procedures; requiring new IJs and BIA members to pass an immigration law exam; increasing the BIA by four new members; and adjusting the BIA's streamlining practices to encourage a proliferation of one-member written opinions addressing poor or intemperate IJ decisions that reach the correct result but would benefit from discussion or clarification.

A remarkable example of the Third Circuit's penchant for addressing systemic issues with the asylum adjudication process is its decision in *Berishaj v. Ashcroft*.⁶⁵ This case involved an asylum review claim filed by an ethnic Albanian from Montenegro (part of greater Serbia).⁶⁶ The court

57. *See id.* at 199 (same).

58. *See id.* at 200 (declaring holding).

59. *See id.* (same).

60. *See id.* at 201 (same).

61. *See id.* (same).

62. 417 F.3d 363 (3d Cir. 2005).

63. *See id.* at 364 (announcing holding in case involving Honduran street children).

64. *See Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals*, DEP'T OF JUSTICE, http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html.

65. 378 F.3d 314, 317 (3d Cir. 2004) (reversing IJ's finding that applicant was not credible and criticizing "disturbing trend" of "grossly out-of-date" administrative records).

66. *See id.* at 316-17 (discussing facts of case).

reversed the IJ's adverse credibility findings and the reliance on changed country conditions as justification for denying the asylum application.⁶⁷

The court devoted several pages of its decision to commentary on the difficulties presented by stale administrative records.⁶⁸ The court observed that, in many of the asylum cases going before the court, the relevant facts related back several years to when the case was initially in the immigration court. In cases where contemporary conditions in the alien petitioner's country were relevant, the court was called upon to review a record, including out-dated written Human Rights reports, which, in many situations, were not indicative of current conditions in the particular country. The court specifically requested the BIA to adopt a policy on the subject—an unusual reaching out by the judicial branch into matters over which the executive branch has responsibility.⁶⁹

The court also alerted the legislative branch to this perceived systemic problem, by sending copies of its decision to the House and Senate Judiciary Committee Chairs and their Counsels. Additionally, the court sent copies to the Attorney General of the Civil Division and the Deputy Assistant in charge of the Office of Immigration Litigation ("OIL"), the Secretary and General Counsel of the Department of Homeland Security ("DHS") and to the Chair of the BIA.⁷⁰ The executive branch did not ignore the Third Circuit's entreaty. After receiving a copy of the Court's *Berishaj* decision, the Office of the Attorney General and the Assistant Attorney General for OIL immediately started to consider how best to address the Court's concerns. Meetings and consultations followed with the Executive Office for Immigration Review and the Department of Homeland Security. As a result, OIL directed all attorneys representing the government to consider whether the age and quality of the record counsels in favor of a stipulated remand.⁷¹

In another case, the Third Circuit refused to defer to the State Department's "allegedly" expert opinion.⁷² In *Ezeagwuna v. Ashcroft*,⁷³ a case involving an asylum claim filed by a citizen of Cameroon, the Third Circuit held that reliance on a letter by the State Department's Director of the Office of Country Reports and Asylum Affairs, which suggested that the petitioner's supporting documents were forgeries, was improper. The court concluded that the report was not valid, and therefore violated the

67. See *id.* at 317 (concluding that IJ's "rejection of *Berishaj* cannot stand").

68. See *id.* at 328-32 (confronting problem of stale records).

69. See *id.* at 331 ("We therefore call on the BIA to adopt-by opinion, regulation, or otherwise-policies that will avoid the Court of Appeals having to review administrative records so out-of-date as to verge on meaningless.").

70. See *id.* at 331-32 (listing parties to whom opinion should be sent).

71. See *Ambartsoumian v. Ashcroft*, 388 F.3d 85, 94-96 (3d Cir. 2004) (including new OIL policy in Appendix to opinion).

72. See *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 411 (3d Cir. 2003) (criticizing BIA for relying on "unreliable and untrustworthy" letter).

73. *Id.* at 405-08.

alien petitioner's right to due process. The *Ezeagwuna* case has recently been relied upon by the Second and Sixth Circuits.⁷⁴

III. PROBLEMATIC REFUGEE RELATED ISSUES FOR PROBLEMATIC APPLICANTS

The Third Circuit has authored some interesting (and potentially leading) precedents in several cases involving applications for withholding removal and/or relief under the Convention Against Torture. Because of the aliens' criminal records, the Immigration and Nationality Act ("INA") relegated aliens to this lesser form of refugee protection.⁷⁵ The court has evinced a concern for these aliens, notwithstanding their negative qualities.

In *Purveegiin v. Gonzales*,⁷⁶ a case involving a Mongolian petitioner with what might impress many as a less than sympathetic situation,⁷⁷ the court vindicated IJ Walter Durling's initial favorable ruling, granting CAT relief to the alien petitioner. The government successfully appealed to the BIA, which reversed the IJ's favorable ruling by way of a single Board member decision. The Third Circuit ruled that the Board violated its own regulation⁷⁸ in its reversal of a favorable IJ decision without consideration by a three-member panel.⁷⁹ The court referred to the Attorney General's 2002 "streamlining" initiative, and cited from the announcement in the Federal Register regarding the "Procedural Reforms to Improve Case Management."⁸⁰

74. See *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 268-69 (2d Cir. 2006); *Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006) (rejecting State Department report from U.S. Embassy in Sofia, Bulgaria, which concluded that alien's documents were fraudulent). The *Alexandrov* court stated that the Third Circuit's *Ezeagwuna* opinion was the leading case in the area for the proposition that the Board cannot rely on troubling hearsay reports and hide behind the State Department letterhead. See *id.* at 405-07 (citing *Ezeagwuna*, 325 F.3d at 406, and noting that documents in *Alexandrov* case were "even less reliable than the letter in *Ezeagwuna*").

75. See Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2006) (precluding aliens with aggravated felony convictions from being granted asylum).

76. 448 F.3d 684 (3d Cir. 2006).

77. See *id.* at 685-86 (detailing factual history of case). After coming to the United States to study, Mr. Purveegiin dropped out of school and was convicted of petty larceny, criminal impersonation and sexual abuse. *Id.*

78. See 8 C.F.R. § 1003.1(e)(6) (2006) (listing requirements for cases to be assigned to three-member panel).

79. See *Purveegiin*, 448 F.3d at 685 (ruling that Board had "erred . . . procedurally in refusing to refer the case to a three-member panel for resolution").

80. See *id.* at 687 (citing 67 Fed. Reg. 54,878, 54,885 (Aug. 26, 2002)) ("The Department believes that the Board's experience with the streamlining initiative has proven that fears of procedural failures or substantive errors being overlooked are not well founded.").

In *Alaka v. Gonzales*,⁸¹ the court ruled that for withholding of removal purposes,⁸² a “particularly serious offense” such as to disqualify the applicant from relief must be an aggravated felony.⁸³ The court identified this matter as an issue of first impression, and apparently is the only circuit court to have rendered such a conclusion. The court ruled in the particular case that the alien petitioner’s band fraud conviction did not qualify as an aggravated felony because the loss to the victim did not exceed \$10,000.⁸⁴

IV. CRIMINAL ALIEN ISSUES

Many of the cases presented to the circuit courts involve aliens subject to removal for a myriad of criminal activity. Many of the alien petitioners are actually lawful permanent residents of the United States. Historically, the immigration laws have been harsh as applied to aliens with significant criminal convictions. The Third Circuit has issued numerous decisions construing various aspects of the legal provisions in this sub-category of immigration law, involving the so-called “criminal alien.”

A. Aggravated Felony Cases

Aliens convicted of aggravated felonies⁸⁵ are subject to removal and have extremely limited relief options. Unfortunately, for our alien population, the INA definitional section contains a long list of enumerated felonies, which qualify as “aggravated.” Another unfortunate reality is that a crime need not even be classified as a felony to constitute an “aggravated felony” under U.S. immigration law. In *United States v. Graham*,⁸⁶ a 1999 decision, the Third Circuit reluctantly acknowledged that the plain read-

81. 456 F.3d 88, 105 (3d Cir. 2006) (considering whether offense must be “aggravated felony” to qualify as “particularly serious”).

82. See Immigration and Nationality Act § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2006) (precluding grant that withholds removal if Attorney General decides that, “the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States”). The statute goes on to read that if “an alien [is] convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of at least 5 years of imprisonment” this absolutely qualifies the crime as “particularly serious.” See *id.* § 1231(b)(3)(B)(ii) (discussing “particularly serious” crime).

83. See 8 U.S.C. § 1101(a)(43)(2006) (defining term “aggravated felony”). See *Alaka*, 456 F.3d at 108 (granting petition to withhold removal claim).

84. See *id.* at 108 (granting petition to withhold removal claim).

85. The numerous aggravated felonies are defined at 8 U.S.C. § 1101(a)(43)(A)-(U) (2006). Since 1988, when this term first became a part of U.S. immigration law, Congress has periodically expanded and amended the list. Aliens convicted of an aggravated felony are subject to deportation under 8 U.S.C. § 1227(a)(2)(A)(iii) (2006). Several relief avenues under other provisions of the INA are specifically barred for aggravated felons. See, e.g., *id.* § 1158(b)(2)(B)(i) (asylum); *id.* § 1229(b)(a)(3), 1229(b)(1)(C) (cancellation of removal); *id.* § 1229(c)(a)(1) (voluntary departure).

86. 169 F.3d 787 (3d Cir. 1999), *cert. denied*, 538 U.S. 845 (1999).

ing of the statute required it to agree that a state misdemeanor petty larceny conviction, for which the alien was sentenced to a term of one year of imprisonment, was properly classified as an aggravated felony.⁸⁷ The court directed its clerk to send copies of the court's opinion to the Assistant Attorney in charge of the Criminal Division, and the ranking majority and minority members and their counsels of the House and Senate Judiciary Committees. Unfortunately, in the seven years since *Graham*, Congress has not accepted the court's invitation.

In recent months, the Third Circuit has addressed other recurring issues involved in determining whether particular offenses come within the ambit of the aggravated felony definition. In *Stubbs v. Attorney General*,⁸⁸ the court concluded that the petitioner's New Jersey conviction for endangering the welfare of children was not "sexual abuse of a minor" under the aggravated felony definition.⁸⁹ Although Mr. Stubbs was charged with sexual misconduct such as to debauch the morals of a child under sixteen, the criminal record did not include any details of his offense. The court explained that the New Jersey Statute was divisible, and included conduct that merely involved neglect. The court observed that a conviction could lie under the statute for willfully failing to provide proper and sufficient food and this could hardly constitute "sexual abuse." Referring to the Supreme Court's decision in *Taylor v. United States*,⁹⁰ the court explained, that in reviewing a conviction under the "categorical approach," consideration of the particular facts underlying the conviction was not permissible.⁹¹ The court agreed with the BIA that Stubbs had been convicted under the prong of the statute involving sexual conduct, which would impair or debauch the morals of a child. However, the court found it significant that there was no claim that the petitioner engaged in sexual conduct *with* the child, and therefore, an essential element of the federal definition of the crime,⁹² as adopted in a BIA precedent deci-

87. *See id.* at 788 ("We conclude that Congress was sufficiently clear in its intent to include certain crimes with one-year sentences in the definition of 'aggravated felony.'"). The INA provides that a theft offense "for which the term of imprisonment at least one year [sic]" is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(G) (2006) (defining one type of aggravated felony). Despite the apparent scrivener's error in leaving out "is," the clear reading of the statute leaves little room to argue that Congress really meant for the punishment to be "more than one year," such as to make the provision consistent with the normal understanding of the demarcation between felonies and misdemeanors. *See Graham*, 169 F.3d at 790 (discussing scrivener's error).

88. 452 F.3d 251 (3d Cir. 2006).

89. *See id.* at 252 (concluding conviction for "endangering welfare of children" under New Jersey statute is not "sexual abuse of a minor"). The INA specifies that "murder, rape, [and] sexual abuse of a minor" are aggravated felonies. *See* 8 U.S.C. § 1101(a)(43)(A) (2006) (defining aggravated felony).

90. 495 U.S. 575 (1990).

91. *See Stubbs*, 452 F.3d at 253-54 (discussing "categorical approach").

92. *See* 18 U.S.C. § 3509(a)(8) (2000) ("[T]he term 'sexual abuse' includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the

sion,⁹³ was lacking. Accordingly, the court vacated the Board's removal order and remanded the case for further proceedings.

The *Stubbs* case is an example of the almost infinite variety of scenarios, which can potentially come to the Courts of Appeals. The immigration statute itself penalizes many categories of criminal conduct, and, of course, there are thousands of different federal and state criminal statutes, not to mention criminal statutes from foreign jurisdictions that also penalize criminal conduct. It is often necessary for the courts to juxtapose the immigration statute with the applicable criminal statute and then proceed to analyze the actual findings by the criminal court, which is often not an easy task in its own right.

Several recent decisions, however, demonstrate that the Third Circuit has not hesitated to undertake this daunting task. *Oyebarji v. Gonzales*⁹⁴ held that in New Jersey, vehicular homicide is not an aggravated felony crime of violence⁹⁵ because the statute of conviction embraces merely reckless conduct. The Third Circuit held the alien defendant's six year jail sentence to be irrelevant based on its appraisal of the statutory definition of the crime and the facts surrounding the defendant's conviction.⁹⁶

In *Popal v. Gonzales*,⁹⁷ the Third Circuit reversed the removal order after recognizing that the Pennsylvania assault statute included recklessness as the minimum culpability necessary for conviction. According to the court, the record of the conviction did not specify the defendant's actual conduct or indicate intent to use force.⁹⁸ Further, in *Tran v. Gonzales*,⁹⁹ the court ruled that a Pennsylvania conviction for "reckless burning or exploding" did not categorically constitute a crime of violence under 8

rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children. . . .").

93. See *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995 (BIA 1999) (finding "definition of sexual abuse in 18 U.S.C. § 3509(a)(8) [was] useful identification of the forms of sexual abuse").

94. 418 F.3d 260 (3d Cir. 2005).

95. See 8 U.S.C. § 1101(a)(43)(F) (2006) (gleaning whether particular state crime contains necessary "violence" element, courts to refer to federal definition of "crime of violence" under 18 U.S.C. § 16 (2006). "Crime of violence" is defined as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id.

96. See *Oyebarji*, 418 F.3d at 262 (declining to consider person's actual conduct where person pled guilty).

97. 416 F.3d 249 (3d Cir. 2005).

98. See *id.* at 254 (noting "settled law" that statutory "crime of violence" must consist of action "with an intent to use force").

99. 414 F.3d 464 (3d Cir. 2005). In *Tran*, the alien defendant was charged with helping to cover up a murder by burning the body. See *id.* at 466 (describing facts of conviction).

U.S.C. § 16, as the federal statute mandated a specific intent to use force and the Pennsylvania statute only required a *mens rea* of recklessness for conviction.¹⁰⁰ In *Ng v. Attorney General*,¹⁰¹ however, the court concluded that an interstate commerce crime involving “murder-for-hire” was an aggravated felony crime of violence, thus upholding the defendant’s removal order.¹⁰² The court stated that, while it was not required to extend deference to the BIA’s conclusion, it nevertheless agreed with the BIA’s ultimate holding under the “categorical approach.”¹⁰³ Similarly, the Third Circuit, in *Ilchuck v. Attorney General*,¹⁰⁴ held that a conviction under Pennsylvania law for diversion of ambulance services constituted an aggravated felony of theft, because the state statute contained the necessary intent element.¹⁰⁵ The court further contended that the criminal sentence of home confinement constituted a sentence to imprisonment for a year or longer such as to satisfy that element of the aggravated felony definition for theft.¹⁰⁶ Ultimately, the court granted the petition for review of the BIA’s determination with regard to the denial of the petitioner’s claim for withholding of removal.¹⁰⁷

B. *Consideration of Post-Conviction Relief*

Given the unyielding nature of our immigration laws for criminally convicted aliens, a major strategy in addressing immigration removal cases is to convince the criminal court to re-visit the criminal disposition. This often takes the form of motions to withdraw guilty pleas through such devices as *coram nobis* or *habeas corpus* petitions. If the alien defendant is successful in securing an order, either vacating a conviction or otherwise revising the plea to a disposition which is not within the ambit of the deportation laws, the next challenge is to convince the IJ or the BIA—depending on the stage of the removal case—that the new criminal court order should be extended full faith and credit.¹⁰⁸

100. See *id.* at 469-72 (analyzing requirements of federal statute to determine whether “reckless burning or exploding” is categorically crime of violence).

101. 436 F.3d 392 (3d Cir. 2006).

102. See *id.* at 397 (declaring holding of case).

103. See *id.* at 395-97 (following categorical approach and looking only to elements of statute, not defendant’s actual intent).

104. 434 F.3d 618 (3d Cir. 2006).

105. See *id.* at 623 (focusing on term “knowingly” as requiring “proof that [defendant] was aware of the practical certainty that his acceptance of the ambulance call would result in diversion of its benefits to someone not entitled to them”).

106. See *id.* (concluding defendant’s sentence was “a term of ‘imprisonment’ in the broad sense intended by the INA”).

107. *Id.* at 626 (noting defendant qualified for withholding of removal).

108. In *In re Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000) and *In re Adamiak*, 23 I. & N. Dec. 878 (BIA 2006), the BIA ruled that a criminal court’s vacation of a criminal conviction based on a defect in the underlying criminal proceeding is entitled to full faith and credit for immigration purposes. In *In re Pickering*, 23 I. & N. Dec. 621 (BIA 2003), however, the Board refused to recognize a purported vacation of a criminal conviction by a Canadian court, based on

Last year, in *Pinho v. Gonzales*,¹⁰⁹ the Third Circuit similarly held that a vacated criminal conviction could not serve as the basis for removal, despite the fact that the vacatur was the result of a settlement agreement.¹¹⁰ Mr. Pinho's case came before the Third Circuit as a result of his appeal from the district court's denial of his application for adjustment of status and its subsequent grant of summary judgment for the government.¹¹¹ Rejecting the government's argument that the petitioner and the criminal court, with consent from the state attorney, had facilitated this disposition in order for Mr. Pinho to achieve his immigration benefit, the Third Circuit found that Mr. Pinho predicated his motion to the criminal court on the theory that his underlying conviction was based on a violation of his constitutional right to counsel.¹¹²

In a more recent case, *Cruz v. Attorney General*,¹¹³ the Third Circuit again addressed the issue of the treatment of an alleged vacated conviction for immigration purposes, although in a different procedural context.¹¹⁴ As a result of Mr. Cruz's guilty plea to a New Jersey "promoting prostitution" offense—a "crime of moral turpitude" under the INA—an

its conclusion that this disposition was merely a device to insulate the alien from the immigration consequences of his prior conviction. The Sixth Circuit Court of Appeals recently reversed the Board's *Pickering* decision. *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006).

109. 432 F.3d 193 (3d Cir. 2005).

110. *Id.* at 215 (finding that decision to vacate was "based on a defect in the underlying criminal proceedings").

111. *Id.* at 196-99 (discussing procedural history, including District Court's holding). The DHS considered Mr. Pinho's application in light of his conviction for possession of cocaine, a controlled substance offense. *See id.* at 197-98 (describing INS denial of adjustment). Prior to his application, a state court vacated his conviction based upon a claim of ineffective assistance of counsel. *See id.* at 196-97 (explaining decision to vacate based on counsel's failure to inform petitioner of Pre-Trial Intervention Program eligibility). Essentially, all the parties agreed to allow Mr. Pinho to withdraw his prior guilty plea, substituting a new disposition which enabled him to participate in a pre-trial intervention program and thus, avoid a conviction. *See id.* at 197 (noting participation in PTI program and subsequent dismissal of charges).

112. *See id.* (focusing on ineffective assistance of counsel claim). In a recent First Circuit decision, the court declined to follow the Third Circuit's analysis in *Pinho*. *See Rumierz v. Gonzales*, 456 F.3d 31, 42 (1st Cir. 2006) ("*Pinho* does not say that the BIA must accept every stipulation which leads to vacating a conviction, whatever the circumstances."). The First Circuit refused to recognize a state court's stipulation as to a vacated conviction, noting that the vacated conviction could have been motivated by any number of reasons; the alien in that case did not show that the conviction was based upon any underlying defect in the criminal proceeding. *See id.* at 42 (upholding BIA's determination regarding validity of conviction for immigration purposes). Judge Lipez wrote a long and thoughtful dissent, relying on the "persuasive analysis" in the *Pinho* case. *See id.* at 50-52 (Lipez, J., dissenting) (urging that BIA decision be vacated and case remanded for termination of removal proceedings).

113. 452 F.3d 240 (3d Cir. 2006).

114. *See id.* at 242 (recognizing difficult issue of vacated convictions' role in immigration proceedings).

immigration judge had ordered him removed from the United States.¹¹⁵ Choosing not to decide the ultimate issue of whether the conviction was adequately vacated for immigration purposes, the Third Circuit instead took the unusual step of remanding the case to the BIA for reconsideration of its prior decision and not to *sua sponte* reopen Mr. Cruz's proceedings, in spite of the untimeliness of Mr. Cruz's motion.¹¹⁶

The court, in assessing its jurisdictional powers, noted that it was confronted with a "jurisdictional conundrum," because of its inability to ascertain whether the BIA declined to exercise its *sua sponte* authority on a reviewable or nonreviewable basis.¹¹⁷ The Third Circuit concluded that the BIA should not have ignored the question of whether the petitioner was still removable by virtue of his vacated conviction.¹¹⁸ Furthermore, the court noted that it was aware of ten unpublished BIA decisions that exercised *sua sponte* authority to reopen proceedings where a conviction had been vacated after the original BIA order.¹¹⁹ The court suggested that, should the BIA determine on remand that the petitioner is no longer convicted under the INA, it would be expected "to reopen [the] proceedings despite the untimeliness of [the] motion, as it has routinely done in other cases . . . or at least explain logically its unwillingness to do so."¹²⁰

IV. CONCLUSION

The United States government's executive branch has recently evinced a strong preference to operate without any interference by the judicial branch. Congress has cooperated with the executive in enacting what practitioners not so affectionately refer to as "jurisdiction-stripping" legislation.

Given the complexity of our immigration laws and the more than occasional lack of quality and consistency in the administrative adjudication process, an alien's ability to petition the federal courts is an extremely

115. *See id.* at 243 (describing basis for removal).

116. *See id.* at 250 (ordering remand of matter for BIA review). Within certain exceptions, motions to reopen removal orders are required to be filed within thirty days of the date of entry of the original order. *See* 8 U.S.C. § 1229(a)(c)(6)(B) (2006) (discussing motions to reconsider). The BIA had previously denied Cruz's motion as untimely, because, pursuant to the statute, it was due on or before May 17, 2004, but was not filed until February 2005. *See Cruz*, 452 F.3d at 245 (addressing untimeliness issue).

117. *See Cruz*, 452 F.3d at 250 (examining issue of whether BIA decision not to reopen *sua sponte* "implicated its unfettered discretion"). The court would have had the power to review the issue of whether the alien was still considered convicted for immigration purposes, but at the same time, perhaps would not have assumed jurisdiction over the discretionary decision on reopening itself. *See id.* at 246-49 (exploring issues of jurisdictional authority).

118. *See id.* at 242 (noting BIA's authority to review issue of vacated conviction).

119. *See id.* at 246 n.3 (listing cases that BIA overlooked untimeliness of alien's motion).

120. *See id.* at 250 (detailing expectations for BIA review on remand).

salutary remedy, not only to be relieved of arbitrary and capricious decisions, but also to render the executive agencies to be more accountable. Particularly in the area of asylum jurisprudence, the Third Circuit has not only protected the critical rights of several individual alien litigants, but has also motivated the Attorney General to work towards improving the quality of decision-making in the executive adjudicative tribunals. Aggressive judicial review is a fundamental concept in our system of government, premised on the checks and balances inherent in the three branches of government.

In general, the Third Circuit deserves to be applauded for performing a strong and productive role as the third branch of government. Inevitably, advocates of a stronger executive branch will take issue with the court's occasional forays, construing the incursions as encroaching on the prerogatives of the executive branch. In any event, the Third Circuit court's overall performance in grappling with the many controversial and complex issues, which immigration litigation often generates, deserves high marks for its dedication in assuring that the alien litigant has a meaningful day in court after filing a petition for review. The Third Circuit has exemplified its own admonition in being a paragon of the American system of justice.